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IN THE

Supreme Court of the United States

October Term, 1980

WALTER ZANT, WARDEN,
Petitioner,

v.

JACK HOWARD POTTS,
Respondent.

On Appeal From the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a habeas corpus petitioner, who is under death sentence, makes an intentional, knowing and unequivocal abandoment of his federal habeas corpus rights, is his subsequent successive petition raising identical issues an abuse of the writ of habeas corpus?

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OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. See Potts v. Zant, 638 F.2d 727 (5th Cir. 1981) (Appendix 1). The opinion of the District Court dismissing Respondent Jack Howard Potts' first habeas

corpus petition is an unreported decision. See Potts v. Austin, No. C80-964A (N.D. Ga. June 13, 1980) (Appendix 60). The opinion of the District Court dismissing Potts' second habeas corpus petition is also an unreported decision. See Potts v. Zant, No. C80-1078A (N.D. Ga. June 26, 1980) (Appendix 75).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered February 17, 1981. See Potts v. Zant, 638 F.2d 727 (5th Cir. 1981) (Appendix 1). A timely petition for rehearing en banc was denied on March 23, 1981, and this petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

28 U.S.C. § 2254(a):

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States."

Rule 9(b) of 28 U.S.C. § 2254:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different

grounds for relief and the prior determination was on the merits, or, if new and different grounds are alleged,the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

STATEMENT OF THE CASE

Respondent Jack Howard Potts' convictions and death penalties were affirmed by the Georgia Supreme Court on direct appeal. Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978). He then filed for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia, which denied relief. His attorneys filed a notice of appeal; but while his appeal was pending, Potts wrote the Georgia Supreme Court in November, 1979, firing his attorneys and

requesting his appeal be dismissed. The Georgia Supreme Court denied a certificate of probable cause to appeal, but allowed Potts' motion to discharge his attorneys. After the Georgia State Board of Pardons and Paroles refused to commute Potts' death penalties to life imprisonment, Potts' execution was set for June 5, 1980.

On the evening of June 4, 1980, Potts filed for federal habeas relief and the District Court stayed the execution set for June 5.

However, after the District Court stayed the June 5, 1980, execution, Potts immediately wrote the District Court that he be allowed to withdraw his appeal, fire his attorneys, and be executed as soon as possible. (Appendix 91-93).

Neither the District Court nor the attorneys for Potts or Warden Zant were aware of an appropriate procedure for handling this issue, so prior to the hearing the District Court proposed in chambers that Potts would be examined in open court in a manner analogous to the acceptance of a guilty plea under F.R.Crim.P. 11. (Appendix 89).

Potts was brought to the District Court and carefully and thoroughly examined by the Court. Potts was informed of his right to counsel, and he refused to have an attorney represent him. (Appendix 88-89, 106). Potts was placed under oath. (Appendix 90). He testified that he understood the nature of the proceedings and admitted he wrote the letter received by the Court June 6, 1980. (Appendix 91-93).

Potts said he understood the consequences of his action, and then the Court advised him of his Fifth Amendment right against self-incrimination. (Appendix 93-94). Nevertheless, Potts admitted in open court that he had been found guilty of a murder he had in fact committed. (Appendix 94).

No one had threatened or coerced Potts into abandoning his federal habeas corpus remedies. (Appendix 95). His decision to abandon his federal habeas remedies was for the grounds stated in the letter, i.e. so that he could die in a state of grace. (Appendix 92, 95). Then the following dialogue ensued:

The Court:

> "Do you understand that if the Court grants your request and dismisses these appeals, that under Georgia

law that you would immediately be resentenced and within ten to twenty days of that date, that sentence of the Court would be carried out?"

Potts:

"This is my wish."

The Court:

"You understand that is what - -"

Potts:

"Yes, sir, I understand it perfectly clear." (Appendix 96).

Potts was knowledgeable about the legal history of his case. (Appendix 96-103). He had written the Georgia Supreme Court in November and December, 1979, and in January, 1980, asking that his appeal be dismissed. (Appendix 102-03).

He knew what was in his federal habeas corpus petition. (Appendix 103, 105). Then occurred the following exchange:

The Court:

> "The action you are requesting, do you realize would be an abandonment [Emphasis added] of certain constitutional, claims of certain constitutional violations? Do you understand that?"

Potts:

> "Yes, sir."

The Court:

> ". . . Do you understand that if you dismiss or abandon this, you have abandoned your last available attack upon your conviction and sentence [Emphasis added]?"

Potts:

"I'm well aware of that."

The Court:

". . . Do you have any question of the Court concerning this matter or the effect of your withdrawal or abandonment [Emphasis added] of this action?"

Potts:

"No."

The Court:

". . . You realize if I dismiss those, then you have nothing from which to appeal to the Court of Appeals for the Fifth Circuit or to the United States Supreme Court?"

Potts:

"Yes, sir."

The Court:

"Do you realize the consequences of that would be that you would be remanded to the State prison for resentencing by the two superior courts involved?"

Potts:

"Yes, sir." (Appendix 104-06).

Prior to the hearing, the District Court had requested Psychiatrist William Davis to observe the hearing and then determine as to whether or not Dr. Davis could testify Potts was competent and understood the consequences of his request. (Appendix 108,111-12). Dr. Davis testified unequivocably that Potts understood what he had requested, the

nature of the request, and the consequences of the request. (Appendix 112).

After Dr. Davis testified, the District Court asked Potts if events or treatment at Georgia State Prison, Reidsville, Georgia, had caused Potts to abandon his habeas corpus petitions. (Appendix 114). Potts replied that his reasons were as stated in his letter to the Court. (Appendix 114).

The District Court orally dissolved the stay (Appendix 115),dismissed the habeas petition, and entered judgment for the Warden. (Appendix 60).

Potts' new execution date was set for July 1, 1980. On June 25, 1980, Potts filed a second federal habeas corpus petition raising the identical issues presented in his first petition. A hearing was held before the District Court on June 20, 1980.

It was undisputed at that hearing that Potts was not alleging he was incompetent when he abandoned his federal habeas corpus rights. After the hearing argument of counsel, the District Court dismissed Potts' second petition as an abuse of the writ.

The Fifth Circuit Court of Appeals granted a stay of execution and on February 17, 1981, vacated the District Court order and remanded the case to the District Court for an evidentiary hearing on whether Potts' abandonment of his federal habeas corpus rights was voluntary. Potts v. Zant, 638 F.2d 727 (5th Cir. 1981). (Appendix 1). There were a concurring and a dissenting opinion. Warden Zant's timely petition for rehearing en banc was denied March 23, 1981. (Appendix 84-85).

REASON FOR GRANTING THE WRIT

WHERE A HABEAS CORPUS PETITIONER WHO IS UNDER DEATH SENTENCE, MAKES AN INTENTIONAL, KNOWING AND UNEQUIVOCAL ABANDONMENT OF HIS FEDERAL HABEAS CORPUS RIGHTS, HIS SUBSEQUENT SUCCESSIVE PETITION RAISING IDENTICAL ISSUES IS AN ABUSE OF THE WRIT OF HABEAS CORPUS.

This case presents an important question of federal law which has not been, but should be, settled by this Court.

By deliberately by-passing State remedies, a habeas petitioner may be denied federal habeas relief. See Fay v. Noia, 372 U.S. 391, 438-39 (1963). The standard to be applied is the definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) -- "An intentional relin-

quishment or abandonment of a known right or privilege." Fay v. Noia, supra at 438-39.

Just as a habeas petitioner may abandon his State remedies, he may abandon his claim to federal relief. See Sanders v. United States, 373 U.S. 1, 18 (1963); Wong Doo v. United States, 265 U.S. 239 (1924). If a second habeas corpus petition raises new issues not presented in the first petition, then to have abuse of the writ it must be shown that there was inexcusable neglect or that the petitioner deliberately withheld a claim from the first petition. Haley v. Estelle, 632 F.2d 1273 (5th Cir. 1980); Mays v. Balkcom, 631 F.2d 48, 51 (5th Cir. 1980); Paprskar v. Estelle, 612 F.2d 1003 (5th Cir. 1980).

However, where a successive petition raises identical issues to a previous petition that was knowingly and voluntarily abandoned, the successive petition constitutes an abuse of the writ. See Wong Doo v. United States, 265 U.S. 239 (1924).

The purpose of the hearing of June 10, 1980, before the District Court was to determine whether or not Potts' abandonment of his federal habeas corpus rights was knowing and voluntary. Potts stated that he was not being coerced into abandoning his federal habeas corpus rights. He was rational and understood the consequences of his acts and the nature of the proceedings, and he testified it was his wish to abandon his federal habeas corpus rights. Dr. Davis testified Potts understood what he was doing and the consequences of his action. Potts' own attorneys later conceded Petitioner was competent.

The evidence produced to the District Court on June 10, 1980 established beyond any doubt that Potts made a knowing and voluntary abandonment of his federal habeas corpus rights. Petitioner should be bound by the representations he made to the District Court. Cf. Bryan v. United States, 492 F.2d 775 (1974), cert. denied, 419 U.S. 1079 (1974). Potts' filing a second petition raising identical issues to the petition he previously abandoned constituted an abuse of the writ.

Petitioner has been convicted in the courts of Georgia of capital crimes and the death penalty was imposed. His convictions and sentences were affirmed on direct appeal, and he had a habeas corpus hearing in the Superior Court of Tattnall County, Georgia. Petitioner knowingly and voluntarily abandoned his federal habeas corpus rights.

There should be a finality to post-conviction litigation, even post-conviction litigation on behalf of inmates under death sentence. The remanding to the District Court for another hearing on voluntariness is to allow Potts to frustrate the legal processes.

CONCLUSION

For all of the previously stated reasons, a petition for writ of certiorari should be granted by this Court.

Respectfully submitted,

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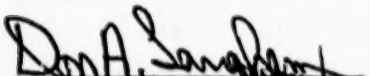

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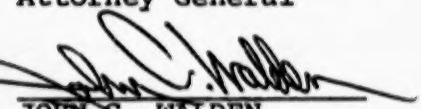

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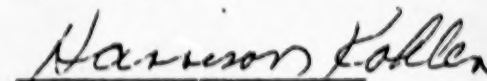

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CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of this Petition for Writ of Certiorari upon the Respondent by depositing this petition in the United States mail with sufficient, first-class postage affixed and addressed to counsel for Respondent as follows:

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